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No. 161

In the Supreme Court of the United States

OCTOBER TERM, 1960

HARRY SAGANSKY AND MORRIS WEINSTEIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 358 F. 2d 195.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1966, and a petition for rehearing denied on April 14, 1966. The petition for a writ of certiorari was filed on May 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was entrapment as a matter of law.

220-607—66

2. Whether a gambler who accepts a bet over the telephone is using a wire communication facility for the transmission of bets within the meaning of 18 U.S.C. 1084.

3. Whether the statute is applicable where only one bet is placed.

STATUTE INVOLVED

18 U.S.C. 1084(a) provides as follows:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted on several counts [1] of using wire communication facilities for the interstate transmission of wagers, in violation of 18 U.S.C. 1084. They were given concurrent one-year sentences. In addition, Sagansky was fined $5,000 and Weinstein $2,000 under count one (R. 5–7, 246–248). The court of appeals reversed and remanded for a new trial because of error

[1] Both petitioners were charged under the first four counts, Sagansky alone under the fifth count. They were convicted as charged.

in the trial court's instruction to the jury on the issue of entrapment (Pet. App. 16–28).

1. The evidence showed that on January 22, 1964, special agent Hanley of the Treasury Department's Intelligence Division went to Sagansky's apartment in Brookline, Massachusetts, where he collected money on one racing bet and placed another. Sagansky told Hanley that he was going to Florida on January 27, and that Hanley was to use two telephone numbers previously given to call "Moe" (petitioner Weinstein) and "Bernie", who would handle Hanley's "action" while Sagansky was out of town. Hanley told Sagansky that he would be in Washington the next day and would call him and give him some action. Sagansky said "Sure, that's okay" (R. 31–36, 239, Govt. Exhs. 2 and 3).

On the following day, Hanley in Washington called Sagansky at the latter's Brookline apartment, using the number that Sagansky had given him. Hanley told him that he had had a little luck, referring to a bet placed the day before with Sagansky, and that he had $6,200 coming to him. He then placed another bet. Special agent Richman, standing behind Hanley, was able to hear the conversation (R. 36–38, 141–143), which formed the basis of count 5 of the indictment. Later the same day Hanley collected his winnings at Sagansky's apartment. Sagansky again told Hanley that he was to use the two telephone numbers given previously and that Moe and Bernie would handle his action. Sagansky cautioned Hanley against calling from a place where the number would be recorded and asked that any future calls be made from a telephone booth (R. 38–41).

Hanley had conversations on January 30 and February 4 with Weinstein.[2] On the first occasion, Hanley attempted to bet on a hockey game. He was told they did not handle such bets but did handle basketball bets. On the second occasion, Hanley placed a basketball bet (R. 41–45, 53–57). Hanley also placed horse-racing bets with Weinstein by telephone on February 7 and 8 (R. 60–61), and, on February 10, called Weinstein in Massachusetts from Washington and placed a bet on a horse race. The two commented on the noise caused by placing the coins in the pay phone. Agent Balen, standing behind Hanley, heard the conversation through the slightly tilted receiver (R. 62–64, 144–146). Count 1 of the indictment was based upon this evidence.

Counts 2, 3, and 4 were based on other calls by Hanley in Washington to Weinstein in Massachusetts in which bets were placed (R. 64–73, 151–154). When Hanley called person-to-person one time, he heard Weinstein state that he was not in. The next day, after a station-to-station call, Weinstein warned against person-to-person calls as being dangerous (R. 67–70).

2. On the issue of entrapment, the judge instructed the jury that they must decide two questions: (1) whether an agent of the government had induced the defendants to commit the offenses, and (2), if so, whether the defendants had been willing, and without persuasion awaiting any propitious opportunity, to

[2] Hanley later met Weinstein and was thus able to identify his voice (R. 57–58).

commit the offense. The accused had the burden of coming forward with evidence of inducement, but the government had the burden of proving predisposition beyond a reasonable doubt (R. 200). The court of appeals held that this instruction was improper, since, in its view, the government's own evidence established inducement as a matter of law.

ARGUMENT

There is no question warranting review of this interlocutory decision.

1. Petitioners were not entitled to an acquittal on the ground that the evidence established entrapment as a matter of law. They were shown to have been in the business of accepting wagers, and the record suggests they were aware that their conduct in accepting bets through interstate phone calls violated federal law. Thus, Sagansky warned against Hanley's calling from his office because of the records kept by the telephone company; and Weinstein refused to accept a person-to-person call from Washington, though he readily accepted the succeeding station-to-station call in which—like Sagansky—he warned Hanley of the dangers involved in a call that would be recorded and so possibly used later to incriminate them. This case is thus in no way comparable to *Voves* v. *United States*, 249 Fed. 191 (C.A. 7), where the government used a "pale-faced" Indian to trick the defendant into violating a statute forbidding the sale of liquor to Indians. Petitioners here were plainly not the "unwary innocents" that the rule against entrapment seeks to protect. *Sherman* v. *United States*, 356 U.S. 369.

2. The conduct proscribed by Section 1084(a) of the Criminal Code is the use by professional gamblers of wire communication facilities for the interstate transmission of wagers. The court of appeals was in our opinion clearly correct in ruling that a gambler's receipt of a wager over such facilities constitutes a forbidden use. The purpose of the statute is to assist the States in the enforcement of their laws against gambling by prohibiting the use of such facilities for the transmission of wagers (H. Rep. No. 967, 87th Cong., 1st Sess.); this purpose would be largely thwarted if the gamblers themselves were free of any criminal liability where such facilities were used merely because the party making the bet had placed the call. The use of the facility is by both parties—as much by the gambler, whose business depends upon it, as by the bettor. Cf. *Rathbun* v. *United States*, 355 U.S. 107, 113, affirming 236 F. 2d 514; *United States* v. *Polakoff*, 112 F. 2d 888 (C.A. 2).[3]

3. The use of the words "placing of bets or wagers" in the statute is, as the court of appeals noted, merely a colloquial way of describing the placing "of any bet or wager." In view of the requirement that the accused be engaged in the business of betting or wagering, no rational purpose would be served by also

[3] Petitioner cites (Pet. 14) language to the contrary from *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill.), affirmed *per curiam*, 376 U.S. 782. But all that was decided there was that the telephone company had the legal right to discontinue service over a phone used exclusively for gambling purposes. The issue of the present case was not involved.

requiring that every violation of the statute consist of at least two illegal acts.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1966.

[4] *United States* v. *Cohen*, 35 F.R.D. 227, 231 (N.D. Cal.), cited by petitioners, holds only that it is not duplicitous to charge several acts as one offense in a single count. The court expressly stated that the government could have made each telephone call a separate offense.

U.S. GOVERNMENT PRINTING OFFICE:1966

Office-Supreme Court, U.S.
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JUN 25 1966
JOHN F. DAVIS, CLERK

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REPLY BRIEF OF PETITIONERS

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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REPLY BRIEF OF PETITIONERS

The Government's Brief in Opposition states, at page 5:

> ". . . the record suggests they [*i.e.*, the petitioners] were aware that their conduct in accepting bets through interstate phone calls violated federal law. [citation of factual instances of surreptitious conduct] This case is thus in no way comparable to *Voves* v. *United States*, 249 Fed. 191 (C.A. 7), where the government used a

> "pale-faced" Indian to trick the defendant into violating a statute forbidding the sale of liquor to Indians."

Apparently, the Government concedes that the only feature distinguishing this case from *Voves* is the "suggestion" in this record that the defendants were conscious of the specific wrongdoing with which they were charged and, absent such evidence, the instant case would present an entrapment as matter of law.

This brief is submitted to correct the Government's statement of the record and to demonstrate that application to the record *as so corrected* of the legal principles assumed by the Government supports the contentions of the petitioners.

The Government can only have reference to two instances of surreptitious conduct, one on the part of each petitioner. In the first, occurring on January 24, 1964, the petitioner Sagansky, after ascertaining that the Government agent had placed his bet from Washington on the day before, is quoted as saying to the agent (R. 40):

> "Look, that could be dangerous. I have to be careful . . . The people who wanted to could find my number on your bill . . . From now on when you call, use a phone booth, a pay phone."

In the second instance, occurring on February 19, 1964, the petitioner Weinstein, referring to his refusal to accept the agent's person-to-person calls of the preceding day, is quoted by the agent as follows (R. 69):

> "Look, you shouldn't call person to person . . . You know, it's dangerous. I have to be careful."

The foregoing is the entire evidence on the point and is plainly no more indicative of knowledge of the specific

offense charged than was the evidence of concealment in *Ingram* v. *United States*, 360 U.S. 672, 79 S. Ct. 1314 (1959). In that case, the Court, in treating the Government's contention that concealment of a lottery would support an inference of knowledge with respect to federal tax laws, said, 360 U. S. at 679, 79 S. Ct. at 1320:

> "Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted."

Similarly, a familiarity with a specific law governing interstate commerce cannot be fairly charged to these petitioners merely on the basis of statements calculated only to insure the secrecy of an enterprise which violated local law.

The instant case, then, is no different from the case that would have been presented had the "pale-faced" Indian made his purchase on a Sunday in a jurisdiction prohibiting the Sunday sale of liquor but constituting it a less serious offense than a sale to an Indian. Surely, no one would contend that surreptitious conduct on the part of the storekeeper could be translated into evidence of a conscious willingness to commit the more serious offense of sale to an Indian. Even the Court of Appeals in the instant case recognized the need to keep the distinction between offenses when evaluating state of mind, saying in its opinion, 358 F. 2d at 202*:

> "... the fact that the defendants were, we will assume, self-advertised as engaged in accepting bets did not constitute an open offer to commit the much more serious offense of transmitting across state lines."

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*Also set forth in the Appendix of the instant Petition, at page 26.

We submit, therefore, that the evidence relied on by the Government is inadequate to remove the instant case from the *Voves* principle and that even the Government's cautious statement that the record "suggests" specific knowledge on petitioners' part is not warranted.

Respectfully submitted,

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